



WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

October 31, 2005

Kent Hoffman, Deputy State Director
Division of Lands and Minerals
Bureau of Land Management
Utah State Office
440 West 200 South
Salt Lake City, UT 84145
HAND DELIVERED

COPY

Cathrine L. Beaty, Acting Regional Forester
USDA Forest Service, Intermountain Region
324 25th Street
Ogden, UT 84401
VIA FAX (801.625.5359) AND FIRST-CLASS MAIL

Forest Supervisor
Manti-La Sal National Forest
599 West Price River Dr.
Price, Utah 84501
VIA FAX (435.637.4940) AND FIRST-CLASS MAIL

Re: PROTEST OF OIL AND GAS LEASE SALE – UTAH, NOVEMBER 15, 2005
PARCELS – UT158-UT 168 – WITHIN THE MANTI-LA SAL NATIONAL FOREST

This Protest is filed by **Red Rock Forests** pursuant to 43 CFR 3120.1-3. Red Rock Forests protests the inclusion of the following eleven (11) proposed lease parcels in the scheduled November 15, 2005 Competitive Oil and Gas Lease Sale to be held by the Utah State Office of the Bureau of Land Management (BLM):

Cedar Knoll Roadless Area – 158
Oak Creek Roadless Area – 160, 161, 162, 163, 164, 166, 167
Price River Roadless Area – 159, 161, 162, 164, 165, 168

UTAH STATE OFFICE
RECEIVED
ADMINISTRATIVE UNIT
2005 OCT 31 PM 3:46
DEPT OF INTERIOR
BUREAU OF LAND MGMT

This protest is directed to (1) the National Forest Service ("Forest Service"), as the agency with surface management authority and the legal responsibility to conserve surface resources, and (2) the Bureau of Land Management ("BLM"), the agency responsible for the lease sale, lease administration and subsurface minerals management. Collectively, the Forest Service and the BLM are referred to as "the agencies". Either agency has the authority and the responsibility to withdraw these lands from the lease sale or impose adequate stipulations to ensure compliance with applicable law and policies.

I. INTRODUCTION

The protested parcels encompass over 21,000 acres within the Manti-La Sal National Forest. Significant portions, approximately 14,000 acres, of these parcels are located within the Cedar Knoll, Oak Creek, and Price River roadless areas. Exhibit 1. Specifically, all or portions of parcels UT-158-168 overlap roadless areas. Accordingly, the Forest Service has recognized the substantial value in the roadless character of these areas and must undertake site-specific analyses prior to leasing. Also, the roadless character of these parcels should be protected in accordance with the illegally revoked roadless rule.

The parcels proposed for leasing harbor diverse resource values including, but not limited to, high quality wildlife habitat, essential riparian areas, vital viewsheds, high value watersheds, important fisheries, and irreplaceable cultural resources. Despite the presence of these resources, the agencies have not sufficiently analyzed the impacts of oil and gas development prior to offering these lands for lease. Therefore, the agencies have failed to comply with their duties under the National Environmental Policy Act (NEPA) in connection with the lease sale. By the same token, the agencies, in offering the parcels for lease without complying with their other legal obligations, have violated the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

As a result, the agencies must remove these parcels from the lease sale until they fully meet their statutory and regulatory duties. Moreover, the value of the resources contained within these parcels and the threat to these resources posed by the lease sale and any subsequent oil and gas development may require that the parcels be permanently closed to any oil and gas development.

II. STATEMENT OF STANDING

Red Rock Forests, based in Moab, Utah, has approximately 315 members, many of whom reside in Utah. Red Rock Forests' mission is the preservation of Utah's mountain islands in the heart of America's red rock country. Red Rock Forests relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. Red Rock Forests maintains a particular

interest in the forested uplands of southern Utah. Red Rock Forest members and staff frequently visit the Manti-La Sal National Forest. Members visit the Manti-La Sal National Forest on a regular basis—traveling specifically to the areas encompassed by the lease sale, including the roadless area lands at issue in this protest. Members hike, camp, observe wildlife, photograph scenery, and find emotional and spiritual sustenance in the forested mountains above the red rock wilderness of southeast Utah. Red Rock Forests members' enjoyment of the Manti-La Sal National Forest, in particular the Cedar Knoll, Oak Creek, and Price River roadless areas, will be diminished by oil and gas development.

III. STATEMENT OF FACTS

The agencies have proposed to offer nearly 22,000 acres of the Manti-La Sal National Forest for oil and gas development despite the absence of adequate pre-leasing analysis. Of particular importance, nearly 14,000 acres proposed for leasing are within invaluable roadless areas. The agencies must ensure compliance with federal environmental laws prior to leasing these parcels.

On September 16, 2005, BLM released its Notice of Competitive Lease Sale list for the scheduled November 15, 2005 lease sale. This list includes numerous parcels within the Manti-La Sal National Forest. According to the Forest Service, "[t]he decision to consent to issuance of oil and gas leases for these lands is contained in the Record of Decision dated January 12, 1993, which is based on the Environmental Impact Statement for Oil and Gas Leasing on Lands Administered by the Manti-La Sal National Forest." Letter from Cathrine L. Beaty, Acting Regional Forester of Intermountain Region of the Forest Service, to Sally Wisely, State Director of BLM (Aug. 24, 2005). Based on the documents provided by BLM, there appears to have been no consultation with the Fish and Wildlife Service, the State Historic Preservation Office, or affected tribes concerning this lease sale nor any site-specific analysis, such as Documentation of NEPA Adequacy.

As discussed further below, the Environmental Impact Statement for Oil and Gas Leasing on Lands Administered by the Manti-La Sal National Forest (Oil and Gas EIS), along with the associated Record of Decision (ROD), demonstrate that the agencies did **not** conduct any pre-leasing site-specific analysis of the disputed parcels, other than the general analysis performed in conjunction with the Oil and Gas EIS and ROD. More specifically, the agencies have not analyzed the site-specific impacts of oil and gas development in the parcels on important resource values, such as roadless areas, threatened and endangered species, or cultural resources.

In the Oil and Gas FEIS Record of Decision, BLM notes that "[t]he Forest Plan and Forest Plan FEIS became effective on November 5, 1986, and are not current with recently promulgated laws, regulations, legal decisions, and Forest Service policy for oil and gas leasing." Oil and Gas FEIS Record of Decision - Summary at 2. Moreover, the Oil and Gas FEIS "recognize[s] that a leasing analysis should be as site-specific as possible in order to adequately address potential impacts and make informed management decisions regarding oil and gas leasing." Oil and Gas FEIS Record of Decision - Summary at 3. However, the Oil and Gas FEIS did not analyze the

site-specific impacts of oil and gas leasing. Instead, the Oil and Gas FEIS analyzed “management units,” which “were delineated on the basis of resource emphasis and goals.” Id.

In delineating these management units, BLM failed to analyze site specific environmental and cultural impacts or properly account for roadless areas. Rather, despite comments objecting “to leasing and surface occupancy within roadless areas,” BLM “released” some IRAs “to other multiple-use management.” Id. at 6. This multiple-use management regime allocated IRAs to several different management prescriptions. However, as explained in an April 2004 DEIS, “[t]he Manti-La Sal LRMP does not provide desired conditions, goals, standards, or guidelines to specifically address or maintain roadless or unroaded character.” Forest Service, DEIS – State of Utah School and Institutional Trust Lands Administration (SITLA) Access Route on East Mountain (April 2004) at 39. Thus, the agencies have not analyzed the impacts of leasing on roadless areas and have not addressed the inappropriateness of oil and gas leasing in the context of these roadless areas.

Also of particular relevance, Red Rock Forests protested the agencies decision to offer several parcels within the Manti-La Sal National Forest in the June 25, 2004 lease sale. In a decision dated, October 20, 2005, BLM determined that:

[b]ased upon documentation contained in the BLM for the subject lease sale, BLM is unable to determine whether existing NEPA analysis is adequate for the six protested parcels. BLM also is unable to determine from the record whether the Forest Service conducted adequate consultation processes under the ESA and NHPA for the 6 protested lease parcels. Specifically with respect to Section 106 of the NHPA, BLM is unable to determine whether the Forest Service met the requirement of the Interior Board of Land Appeals decision in Southern Utah Wilderness Alliance, 164 IBLA 1 (2004).

Western Resource Advocates, on behalf of Red Rock Forests, has requested all documentation supporting the decision to lease the eleven protested parcels. Based on the agencies response, there are no analyses additional to that pertaining to the June 25, 2004 lease sale. Rather, the agencies continue to rely on the inadequate Oil and Gas EIS and a single letter from the Forest Service. The facts of this lease sale protest are indistinguishable from the protest granted by BLM on October 20, 2005.

Accordingly, as set forth below, the leasing proposal for the relevant parcels violates the National Environmental Policy Act (NEPA), the Forest Service’s Oil and Gas leasing regulations, the National Forest Management Act (NFMA), the illegally rescinded roadless rule, the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

IV. LEASING THE PROTESTED PARCELS VIOLATES NEPA AND NFMA BECAUSE THE AGENCIES FAILED TO PERFORM ADEQUATE PRE-LEASING ANALYSIS OF SIGNIFICANT ENVIROMENTAL IMPACTS.

The agencies have violated NEPA and NFMA by offering the eleven parcels for oil and gas development. This violation of NEPA occurred because the agencies have not completed adequate environmental review of the areas that will be leased without no surface occupancy stipulations. In addition, the agencies violated NFMA by failing to ensure that the leasing of the protested parcels is consistent with the the Forest Plan. See 16 U.S.C. § 1604(i).¹

Leasing of roadless lands that may be eligible for wilderness “require[s] preparation of an EIS unless the lease absolutely prohibits surface disturbance in the absence of specific governmental approval.” Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988)). In the instant case, NEPA documentation must be completed prior to leasing the roadless parcels to ensure, or at the very least to consider, stipulations that fully protect wilderness characteristics of these lands.

IBLA precedent confirms that pre-leasing NEPA analysis is required under these circumstances. Once the BLM issues a lease without adequate NSO stipulations, denial of future APDs and the imposition of NSO stipulations are no longer an “available alternative” for future NEPA analysis at the APD stage. Southern Utah Wilderness Alliance, IBLA 91-330, Slip Op. at 6. “If BLM has not retained the authority to preclude all surface disturbance activity, then the decision to lease is itself the point of ‘irreversible, irretrievable commitment of resources’ mandating preparation of an EIS.” Union Oil Co. of Cal., 102 IBLA 187, 189 (1988). IBLA decisions and federal case law are consistent with the Forest Service Handbook, which provides that proposals to construct roads and substantially impair the roadless character of roadless areas require an EIS. FSH 1909.15, sec. 20.6. (Class 3).

Moreover, the IBLA has recognized that “when BLM adopts the FEIS of another agency in lieu of performing its own environmental analysis and relies on it as the basis for an exercise of its own decisionmaking authority, this Board properly may review that FEIS to determine whether BLM’s decision is supported by the record, guided by the same principles ordinarily applicable to an FEIS prepared by BLM.” Wyoming Outdoor Council, 159 IBLA 388, 401 (2003). Accordingly, “before issuing an oil and gas lease, and thus irreversibly and irretrievably committing to the exploration and development of the oil and gas resources in the leased lands, section 102(2)(C) of NEPA requires an agency to assess the potential environmental impacts of such exploration and development.” Id. at 401-402. Pursuant to NEPA and the Manti-La Sal National Forest Plan, this pre-leasing environmental analysis must be site-specific.

¹ Red Rock Forests understands that BLM has no jurisdiction over issues pertaining solely to the Forest Service and therefore, will not address them in its protest decision. However, this protest is being directed to both the Forest Service and BLM and the Forest Service does have authority, and in fact the legal obligation, to withdraw these parcels prior to the lease sale.

Although the agencies suggests that the Oil and Gas EIS sufficiently analyzed the consequences of oil and gas leasing in the protested parcels, this generalized analysis does not excuse the Forest Service's obligation to analyze the site-specific consequences of the oil and gas leasing within roadless areas. As previously noted, the Oil and Gas EIS did not consider or analyze the impacts of oil and gas leasing in roadless areas. Moreover, the Forest Service did not analyze site-specific consequences of oil and gas development within the protested parcels on important resource values, such as endangered and threatened species or cultural resources.

Pursuant to 40 C.F.R. § 1502.20, "[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. Tiering allows agencies to "concentrat[e] solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28. As these regulations make clear, the issues the agencies must still analyze and have not yet analyzed are the site-specific impacts of oil and gas leasing within the protested parcels. As noted in NWF v. BLM,

[T]o say that the Henry Mountain EA may be tiered to the Henry Mountain EIS does not resolve the issue before us. If, as in this case, implementation of a decision based on a site-specific EA will significantly affect the quality of the human environment, the effect must be analyzed and considered in an EIS. Tiering an EA to a previously completed EIS simply raises the question whether the EIS adequately addresses the environmental effects of the proposed actions, or a supplemental EIS is required because the EIS' analysis is broad and does not address specific impacts.

NWF, 140 IBLA 85, 95.

The Oil and Gas EIS fails to address adequately the impact of oil and gas leasing within roadless areas and therefore, site-specific analysis must be conducted before leasing occurs. Furthermore, the Council on Environmental Quality recognizes that "[a]s a rule of thumb, if the proposal has not yet been implemented, or if the **EIS concerns an ongoing program**, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed.Reg. 18,026, 18,038 (Council on Env'tl. Quality 1981). The Forest Service completed the Oil and Gas EIS in 1993 before the promulgation of the illegally rescinded Clinton roadless rule or the more recent, roadless rule vesting greater decision-making in states. As well, the Oil and Gas EIS did not consider or analyze impacts associated with coalbed methane development or the current status of the area's wildlife and wildlife habitat. Accordingly, the agencies must prepare either a supplement to the Oil and Gas EIS or an Environmental Assessment of the site specific impacts to the leased areas.

Moreover, the Manti-La Sal Forest Plan requires site-specific analysis prior to leasing. According to the Forest Plan:

Negative recommendations, denials, or consent for leasing, permitting, or licensing will be based on **site-specific environmental assessments** using appropriate standards and guidelines. Stipulations for these actions should minimize and/or mitigate effects or conflicts with other resource uses and should return disturbed lands to conditions compatible with the emphasis of the management unit or adjacent management unit.

Manti-La Sal Forest Plan at III-35. Also, “[a]ny lease, license or permit may be denied or limited by standard or additional stipulations where proposed activities could result in irreparable damage, may preclude existing uses or be contrary to management direction.” *Id.* Neither the Forest Plan EIS or the Oil and Gas EIS could be characterized as site-specific analysis of the impacts of oil and gas leasing. Rather, each document is a programmatic analysis that must be complemented by a site-specific analysis at the actual leasing stage.

The protested parcels appear to fall within the Price River and Sanpete North analysis areas of the Oil and Gas EIS. According to the Forest Service, within the Price River Analysis Area there are “three high priority trout fisheries and spawning streams for Scofield Reservoir.” Oil and Gas EIS at IV-99. In addition, there is big game winter range, general winter range, and elk calving areas. *Id.* at IV-100. Moreover, there are ample motorized and non-motorized recreation opportunities. *Id.* at IV-99. Each of these resource values, and many others, must be considered at the site-specific level prior to leasing.

Within the Sanpete North Analysis Area, watershed condition are “poor on canyon slopes due to the unstable nature of the slopes and historic grazing.” *Id.* at IV-101. Substantial work has been completed in the past to “improve watershed conditions” and reclaim primitive roads. *Id.* at IV-101. The Forest Service acknowledges the possibility of impacts to big game population and watershed conditions from oil and gas development. *Id.* at IV-102. Also, the Forest Service recognized the “potential for impacts to water quality and aquatic wildlife habitat...” *Id.* at IV-103. However, the agencies have failed to conduct any site-specific analysis on these and other resource values in the area.

In a recently released report, Trout Unlimited concludes oil and gas development adversely impacts hunting and fishing, even where total surface disturbances are small, by contaminating ground and surface water, reducing water quantity, degrading fish habitat, and fragmenting wildlife corridors, calving grounds and nesting areas. Trout Unlimited, *Gas and Development on Western Public Lands*, available at: www.valle Vidal.org/Downloads/TU_Oil_Gas_low.pdf. This report also points to the significant adverse effects of oil and gas development on viewsheds and aesthetics – the development drastically changes the landscape where hunting, fishing and wildlife viewing take place. *Id.*

Finally, as discussed below, the agencies have failed to comply with the Endangered Species Act or the National Historic Preservation Act prior to offering the parcels for sale. As noted by BLM, prior documentation associated with parcels offered for sale in the Manti-La Sal National Forest has not been sufficient for BLM to determine the adequacy of pre-leasing analysis under NEPA, ESA, and NHPA. The present situation is indistinguishable from the prior lease sale.

Accordingly, the agencies must withdraw the Manti-La Sal National Forest parcels from the November 15, 2005 lease sale. In the alternative, the agencies must impose NSO stipulations covering the entirety of the protested parcels.

V. THE FOREST SERVICE VIOLATED THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT BY FAILING TO COMPLETE THE REQUIRED TWO-STAGE ANALYSIS OF THE PROTESTED PARCELS

The Federal Onshore Oil and Gas Leasing Reform Act “authorized the Secretary of Agriculture to develop procedures and regulations governing leasing for oil and gas resources . . . with the National Forest System.” 55 Fed. Reg. 10423 (March 21, 1990). The Secretary of Agriculture promulgated regulations to implement this Act, which in relevant part, are codified at 36 C.F.R. § 228.102. Pursuant to the implementing regulations:

the decision as to whether to authorize the Bureau of Land Management to offer National Forest System land for leasing is made at the conclusion of the second stage of the process set forth in the rule. The second stage is referred to as the ‘leasing decision for specified lands.’

55 Fed. Reg. at 10428-29.

Pursuant to the second stage of the Forest Service’s leasing decision-making process, the Regional Forester shall offer specific lands for lease subject to:

1) Verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan. If NEPA has not been adequately addressed, or if there is significant new information or circumstances [] requiring further environmental analysis, additional environmental analysis shall be done before a leasing decision for specific lands will be made. If there is inconsistency with the Forest land and resource management plan, no authorization for leasing shall be given unless the plan is amended or revised.

2) Ensuring that conditions of surface occupancy identified in § 228.102(c)(1) are properly included as stipulations in resulting leases.

3) Determining that operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

36 C.F.R. § 228.102(e).

Accordingly, the decision to authorize BLM to offer forest parcels for leasing is “dependent on the results of three determinations that the Forest Service must make.” 55 Fed. Reg. at 10429. However, the Forest Service has failed to make each finding for the Manti-La Sal parcels. First, the protested parcels have not been adequately analyzed in a site-specific NEPA document and are not consistent with the Revised Forest Plan. Second, the appropriate stipulations have not been included for the protested parcels. And, third, oil and gas operations should not occur on roadless parcels absent NSO stipulations or a thorough analysis of the impact on the roadless character of the parcel.

Despite this staged process for oil and gas leasing, the Forest Service has never adequately analyzed the site-specific impacts of oil and gas leasing on the protested parcels. Moreover, the Forest Service has failed to provide an appeal process for its decision, and therefore, the only recourse at this time, is to the BLM. Correct application of the leasing regulations requires site-specific analysis. Because this has not been completed, the agencies must withdraw the Manti-La Sal National Forest parcels.

VI. THE ESA REQUIRES THAT THE FOREST SERVICE CONSULT WITH THE FWS REGARDING ESA SPECIES’ HABITAT BEFORE LEASING.

The DOI Office of the Solicitor for the Rocky Mountain Region has concluded that the ESA requires the Forest Service and BLM to complete consultation with the FWS before issuing a lease that encompasses habitat occupied by threatened or endangered species:

[T]he Department of the Interior may not deny all rights to drill on a Federal oil and gas lease, unless it has expressly reserved that right in the initial lease terms by, for example, imposing a no surface occupancy stipulation (NSO). This means that the appropriate stage for comprehensive study in the case of endangered species . . . is the leasing stage. . . . This also means that in the absence of an NSO stipulation biological opinions need to be completed at the leasing stage to determine whether the Department must expressly reserve the right to prohibit all surface activity on the lease.

Memorandum from Regional Solicitor, Rocky Mountain Region, to Regional Director, Fish and Wildlife Service, Region 6, at 2 (Nov. 18, 1992).

The protested parcels may authorize oil and gas operations in habitat for the Bald Eagle and potentially the Canada lynx, Mexican spotted owl, and/or the Southwestern willow flycatcher. However, the Forest Service pre-leasing analysis has not even considered the habitat issue for these or other listed plant and animal species.

Section 7 of the ESA commands that all federal agencies “shall, in consultation with and with the assistance of” FWS: (1) “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered and threatened species,” 16 U.S.C. §

1536(a)(1), and (2) “insure that any action authorized, funded, or carried out by any agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species.” *Id.* at § 1536(a)(2). DOI regulations implement this consultation requirement by directing that formal consultation is required before a federal agency may take “any action [that] may affect listed species.” 50 C.F.R. § 402.14(a). As the Supreme Court has observed, “[t]his language admits of no exception.” *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 173 (1978). Indeed, by regulation “the granting of ... leases” is an action requiring formal consultation under Section 7. 50 C.F.R. § 402.02.

As part of its ESA obligations, the agencies must adhere to the Canada Lynx Conservation Assessment and Strategy (“LCAS”). The agencies developed the action plan “to provide a consistent and effective approach to conserve Canada lynx on federal lands in the conterminous United States.” LCAS at Executive Summary. In drafting the LCAS, the agencies recognized that “[t]he development of wells can impact lynx habitat. However, the greatest impact is likely the development of road access to facilitate exploration and development.” LCAS at 28.

The agencies have not consulted with FWS on the Manti-La Sal National Forest parcels.² In fact, FWS has not provided a comment/consultation letter on any of the National Forest parcels in this lease sale. Accordingly, the agencies have failed to fulfill their duty to consult with FWS prior to leasing and must withdraw the Manti-La Sal National Forest parcels.

VII. LEASING THE PROTESTED PARCELS VIOLATES THE NATIONAL HISTORIC PRESERVATION ACT.

The IBLA has recently determined that the agencies must make a good faith attempt to “identify ‘historic properties’ located on the subject parcels” during the leasing process. *Southern Utah Wilderness Alliance*, 164 IBLA 1, 23 (2004). Accordingly, the IBLA has made clear that “[c]ompliance with section 106 [of the National Historic Preservation Act] at the leasing stage is intended to ascertain [] the presence of historic properties, including unidentified but identifiable eligible properties.” *Id.* at 28. Identification of cultural resources is a necessary step in the National Historic Preservation Act in order to ensure that agencies “evaluate alternatives or modifications to the undertakint that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.5(2). Neither the Oil and Gas EIS or the Forest Plan EIS made any attempt to identify cultural resources in the parcels proposed for leasing.

The Manti-La Sal Forest Plan recognized that land within the forest “contain[s] prehistoric and historic evidence of man and paleontological values.” Manti-La Sal LRMP at II-24. In fact, the lands encompassed by the protested parcels may contain cultural resources from the paleo-indian stage, archaic stage, Fremont culture, and Pueblo peoples. *Id.* at II-25-26. According to the Forest Plan, the Forest Service’s goals with regards to cultural resources are:

² In addition, consultation with FWS should have occurred pursuant to the Fish and Wildlife Conservation Act, 16 U.S.C. 661 *et seq.*, which provides for “the coordination of wildlife conservation and rehabilitation.”

- Locate and determine the significance of paleontological, historical, and archeological sites, and, as appropriate, nominate sites to the National Register;
- Manage selected historical and archeological sites for public use, while still protecting the values of the site;
- Make select paleontological, historical and archeological sites available for study by agencies involved in research and education;
- Protect from theft and/or vandalism cultural, historical, and paleontological resources.

However, these actions have not been undertaken in compliance with the NHPA or the Forest Plan.

Beyond these objectives, pursuant to the National Historic Preservation Act, the agencies must consult with tribes whose cultural sites are potentially affected by the leasing. 16 U.S.C. § 470 *et seq.*³ The letter and spirit of the NHPA requires the agencies to consult with SHPO, Native Americans, and the public **before** the agency proceeds with undertakings that “may affect” listed or eligible historic properties. Leasing is the point of an irreversible and irretrievable commitment of resources, and thus constitutes an “undertaking” under the NHPA. *See* BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); *see also* 36 C.F.R. § 800.16(y); *see also* Southern Utah Wilderness Alliance, 164 IBLA 1, 22 (2004) (“BLM concedes that the March 2002 lease sale is an undertaking under 36 CFR 800.16(y)”). The NHPA’s implementing regulations further confirm that the “[t]ransfer, **lease**, or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” results in an “**adverse effect**” on historic properties. *Id.* § 800.5(a)(2)(vii) (emphasis added). *See* 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties - Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)). It is therefore at the leasing stage that the agencies may lose the ability to protect cultural resources. The agency cannot defer consultation until the APD phase of operations.

In addition to the NHPA, the agencies must ensure compliance with:

- Federal treaties, which vest Tribes with ongoing rights and the Federal government with ongoing responsibilities;

³ Form letters to tribal governments regarding planning documents are insufficient to meet the agencies’ duty under the NHPA to make a “reasonable and good faith effort” to seek information from Native American tribes. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

- The American Indian Religious Freedom Act, requiring consultation to identify traditional Native American spiritual practitioners' concerns relative to proposed federal actions; and,
- Federal Executive Order 13007 on Native American Sacred Sites, requiring federal land management agencies to accommodate access to and ceremonial use of Indian sacred sites and to avoid adversely affecting these sites' physical integrity.

According to the Advisory Council on Historic Preservation, federal agencies should integrate Section 106 requirements under the NHPA with the requirements of the EO 13007: "Not only would it be more efficient to integrate the requirements, but it might also ensure that all issues and values are given appropriate and timely consideration." Advisory Council on Historic Preservation, *The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106* (available at <http://www.achp.gov/eo13007-106.html>).

Because the agencies have failed to identify cultural resources prior to leasing, the parcels must be withdrawn. In addition, because no consultation occurred, the agencies should withdraw the parcels from the lease sale and initiate consultation to determine whether leasing may affect listed or eligible historic properties. In the meantime, the agencies should initiate a dialogue with SHPO, Tribes, and the public on historic properties and cultural resource protection, as required by the NHPA. SHPO review and tribal consultation cannot wait until after undertakings have been completed.

VIII. THE LEASING PROPOSAL FAILS TO PROVIDE FOR A DIVERSITY OF PLANT AND ANIMAL COMMUNITIES

A. THE FOREST SERVICE FAILED TO ADDRESS IMPACTS TO SENSITIVE SPECIES

By not conducting a site-specific analysis of the direct, indirect, and cumulative impacts of the lease sale, the Forest Service has failed to provide for a diversity of plant and animal communities on the Manti-La Sal National Forest. As part of the NEPA process, the Forest Service is required to prepare a site-specific biological evaluation to determine the potential effect of leasing on sensitive species. Forest Service Manual (FSM) at 2670.32 ("As part of the National Environmental Policy Act process, review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species"). A site-specific EA or biological evaluation is needed to analyze the potential effect of oil and gas development on sensitive forest species, and to ensure that leasing would not threaten the viability of Forest Service sensitive species.

The Forest Service's obligation to manage fish and wildlife habitat "provide for diversity of plant and animal communities", 16 U.S.C. § 1604(g)(3)(B), is particularly relevant to sensitive species. Sensitive species are:

[t]hose plant and animal species identified by the Regional Forester for which population viability is a concern, as evidenced by: (1) significant current or predicted downward trends in population numbers or density; or, (2) significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.

FSM, Sec. 2670.5(19). For sensitive species, the Forest Service is required to: (1) develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions; (2) maintain viable populations of all native and desired non-native wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands; and (3) develop and implement management objectives for populations and/or habitat of sensitive species. FSM, Sec. 2670.22. As stated above, on the site-specific level, through the NEPA process, the Forest Service must "review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species." FSM, Sec. 2670.32(2). If impacts from forest plan implementation cannot be avoided, the Forest Service must "analyze the significance of potential adverse effects *on the population or its habitat* within the area of concern and on the species as a whole." FSM, Sec. 2670.32(4) (emphasis added).

The protest parcels contain habitat for the spotted bat, townsend's big-eared bat, greater sage grouse, northern goshawk, peregrine falcon, flammulated owl, and three-toed woodpecker, each a sensitive species. Without site-specific analysis, the agency simply lacks the information to fulfill this and other management duties relative to these sensitive species that rely on the lands and water resources encompassed by the eleven parcels. As a result, the lease sale is premature and the eleven parcels must be dropped from the lease sale.

B. THE FOREST SERVICE FAILED TO ADEQUATELY ADDRESS IMPACTS TO MIS, MIS HABITAT, AND MIS POPULATIONS

Pursuant to NFMA, the Forest Service is required to "provide for the diversity of plant and animal communities..." 16 U.S.C. § 1604(g)(3)(B). Since 1983, the Forest Service has used Management Indicator Species (MIS) to ensure species viability on the forests. However, the Forest Service has recently amended its regulations to avoid this responsibility. This decision to remove MIS monitoring requirements from NFMA implementing regulations is currently being litigated in several courts. Accordingly, until courts have sufficiently resolved challenges to the Forest Service's new NFMA implementing regulations, the agencies should adhere to MIS requirements to ensure species viability on the Manti-La Sal National Forest. Moreover, MIS monitoring requirements are mandated by the Forest Plan and, as such, compliance at the leasing stage remains necessary to guarantee consistency with the Forest Plan.

Management Indicator Species (MIS) for the Manti-La Sal National Forest include; mule deer, elk, macroinvertebrates, golden eagle, Abert's squirrel, and Northern goshawk. Manti-La Sal Land and Resource Management Plan, at IV-5-6. Here, the Forest Service violated NFMA by failing to conduct a quantitative analysis of population trends of these MIS prior to leasing –

which constitutes an irretrievable commitment of agency resources. 36 C.F.R. §§219.19 and 219.26 (1999).

Unless it is technically infeasible and not cost-effective, the Forest Service is required to collect and analyze quantitative population data, both actual and trend, for MIS. Sierra Club v. Martin, 168 F.3d 1, 6-7 (11th Cir.1999)(MIS regulations require collection of quantitative population data); Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 763 n. 12 (9th Cir.1996) (where data for the MIS were not available because the species was reclusive, the Forest Service properly used habitat trend data rather than acquiring actual population counts because there was no technically reliable and cost-effective method of counting individual members of the species); Utah Envtl. Congress v. Zieroth, 190 F.Supp.2d 1265, 1271 (D. Utah 2002) (Forest Service failed to comply with regulations where failure to collect data was not due to any inability to collect it, but to an agency decision not to collect it); Forest Guardians v. United States Forest Service, 180 F.Supp.2d 1273, 1282 (D. NM 2001)(Forest Service obligated as a matter of law to acquire and analyze both actual and trend MIS population); Colorado Wild v. Forest Service, 299 F.Supp.2d 1184 (D. Colo. 2004)(granting summary judgment where Forest Service failed to conduct a quantitative analysis of MIS population trends). The MIS requirement applies at both the forest plan stage and subsequent project level decisions. See Martin, 168 F.3d at 6 n. 9 (citing Inland Empire, 88 F.3d at 760 n. 6) and Zieroth, 190 F.Supp.2d at 1270 n. 1. The regulations provide that:

- “Planning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species.” 36 C.F.R. §§219.19(a)(2).
- “Population trends of the management indicator species will be monitored and relationships to habitat changes determined.” Id. at 219.19(a)(6).
- “Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.” Id.

[T]aken together, [these] regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest’s diversity. To read the regulations otherwise would be to render one or the other meaningless as well as to disregard the regulations’ directive that population trends of the MIS be monitored and that inventory data be gathered in order to monitor the effects of the Forest Plan.

Martin, 168 F.3d at 7. Actual and trend population data must be collected before decisions for the Forest Service to evaluate data and monitor population trends. Id. at 6. Exceptions might apply where the agency articulates a valid reason for the lack of data, such as technical or practical inability. Inland Empire, 88 F.3d at 763 n. 12 (9th Cir.1996); Zieroth, 190 F.Supp.2d at 1271; Forest Guardians, 180 F.Supp.2d at 1282 n. 10.

The Forest Service appears to lack the required MIS data to approve leasing of these areas for oil and gas development. The Forest Service needs to apply present population data for the MIS to determine relationships between the habitat impacts and population changes. Such data must be provided and evaluated in a site-specific EA for the leasing proposal. Site-specific analysis must address the impacts of future development under the leases to MIS, MIS populations, and MIS habitat.

Project-level decisions such as leasing must be informed by legally and biologically required MIS data. Absent a site-specific MIS analysis or population trend data, the agency has not determined the relationship between population trends and MIS habitat changes in accordance with 36 CFR § 219.19(a)(6).

IX. LEASING THE ROADLESS PARCELS VIOLATES THE ILLEGALLY REVOKED ROADLESS RULE

On January 12, 2001, the Secretary of Agriculture issued the final Roadless Area Conservation Rule, generally prohibiting road construction to protect natural values in IRAs of the National Forest System. 66 Fed. Reg. 3244 (Jan. 12, 2001). The Roadless Rule prohibited new mineral leases that would allow new road construction within inventoried roadless areas. 36 C.F.R. § 294.12 (repealed).

On May 13, 2005, the Forest Service announced a new rule purportedly protective of IRAs. Essentially, the Forest Service established “a petitioning process that will provide Governors an opportunity to seek establishment of and adjustment of IRAs [with their state].” 70 Fed. Reg. 25653, 25654 (May 13, 2005). The legality of the Forest Service’s new Roadless Rule is currently being determined through litigation as it appears the Forest Service violated the Administrative Procedures Act and NEPA in promulgating the rule. Accordingly, because the leasing proposal does not accord the full range of protection required by the previous Roadless Rule and the legality of the new Roadless Rule is uncertain, the Forest Service should ensure compliance with both rules pending judicial resolution.

The previous Roadless Rule sets forth the Forest Service’s legal obligations for these areas. The Forest Service may not ignore its dictates until the new Roadless Rule is determined to be legal. Essentially, the previous Roadless Rule prohibited oil and gas leasing in IRAs absent NSO stipulations. Because the Forest Service has not attached NSO stipulations to the parcels within IRAs, the Forest Service is violating the previous Roadless Rule.

Moreover, under the new Roadless Rule, the Forest Service has established a deadline of November 13, 2006 for the Governor of any State to petition the Forest Service “to promulgate regulations establishing management requirements for all or any portion [of an IRA].” 36 C.F.R. § 294.12. Yet, the Forest Service is proposing to lease parcels within IRAs prior to allowing Utah’s Governor to petition for their protection. As such, the Forest Service is prejudicing the state petition process. Therefore, under the new Roadless Rule, the Forest Service should delay leasing in IRAs until the petition process has run its course.

If the parcels are not withdrawn, the agencies must condition leasing on imposing NSO stipulations – not subject to waiver or exemption – for all IRA lands within the proposed lease parcels to protect the full range of roadless area values as required by the previous Roadless Rule and as presumed by the new Roadless Rule.

X. NFMA REQUIRES THAT THE FS COMPLY WITH FOREST PLAN STANDARDS FOR WILDLIFE HABITAT CAPABILITY.

The current Forest Plan does not analyze whether the impacts of oil and gas development would degrade habitat capability and effectiveness standards, in violation of NFMA. NFMA provides that actions at a site-specific level, such as minerals leasing, must conform to the Forest Plan for the area. “Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). Forest Service regulations and guidance reinforce the mandate that all management practices and activities on a forest be consistent with the forest plan. See 36 C.F.R. § 219.10(e); FS Manual 1922.41(1); FS Handbook 1909.12(5.3)

The governing Forest Plan dates to 1986 and needs revision. The 1993 Oil and Gas EIS is also dated—especially with regard to changing science and public opinion on the value of roadless areas. Federal courts have not hesitated to strike down site-specific actions where they did not conform to the Forest Plan. See Friends of Southeast’s Future v. Morrison, 153 F.3d 1059, 1070-71(9th Cir. 1998)(striking proposed timber sales that were inconsistent with the forest plan); Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1377 (9th Cir. 1998) (same).

The Forest Service must establish that leasing and subsequent development would comply with forest standards for Habitat Capability and the northern goshawk. Leasing cannot proceed absent a determination that the FS can meet habitat capability prescriptions if the roadless and adjacent lands are opened to oil and gas development.

A valid Forest Plan consistency analysis must examine habitat effectiveness by management prescription area. Before leasing, the FS must analyze whether leasing is consistent with habitat capability and habitat effectiveness standards, and develop appropriate mitigation measures.

XI. BLM HAS BROAD DISCRETION OVER LEASING DECISIONS.

The Mineral Leasing Act provides: “All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a). In 1931, the Supreme Court found that the Mineral Leasing Act “goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare.” United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A 1965 case stated that the Mineral Leasing Act “left the Secretary discretion to refuse to issue any lease at all on a given tract.” Udall v.

Tallman, 85 S.Ct. 792, 795 (1965) reh. den. 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove minerals leasing of public lands.

At the point of submission of an application for lease to the federal government, no right has vested for the applicant and the BLM retains the authority not to lease:

The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), cert. den. 383 U.S. 912 (1966); see Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (“[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior”); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) (“While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory”); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) (“[T]he Secretary has discretion to refuse to issue any lease at all on a given tract”); Geosearch, Inc. v. Andrus, 508 F.Supp. 839 (D.C. Wyo. 1981) (leasing of land under Mineral Leasing Act is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that the BLM has “plenary authority over oil and gas leasing” and broad discretion with respect to decisions to lease. Penroc Oil Corp., 84 IBLA 36, 39 (1985).

By withdrawing the disputed parcels, BLM would properly exercise its discretionary authority under the Mineral Leasing Act. BLM should withdraw the roadless parcels to ensure compliance with applicable law.

XII. ANY FUTURE DEVELOPMENT ON THE MANTI-LA SAL NATIONAL FOREST SHOULD MINIMIZE THE SURFACE FOOTPRINT AND IMPACTS TO OTHER RESOURCES.

Red Rock Forest appreciates various NSO stipulations for some portions of the roadless lands. However, advance drilling technologies have proved effective in reducing the impacts of oil and gas development throughout the region. Indeed, horizontal drilling has allowed greater recovery of reserves from several reservoirs.

Both directional drilling techniques and drilling multiple bores from a single wellpad can reduce disturbances. The agencies should not hesitate to mandate minimum footprint drilling technologies to protect sensitive surface resources. It appears that these technologies are readily available and that their use can balance environmental protection and multiple use-sustained yield principles with mineral development. Minimum footprint technologies should be applied across the Manti-La Sal National Forest

XIII. CONCLUSION AND REQUEST FOR RELIEF

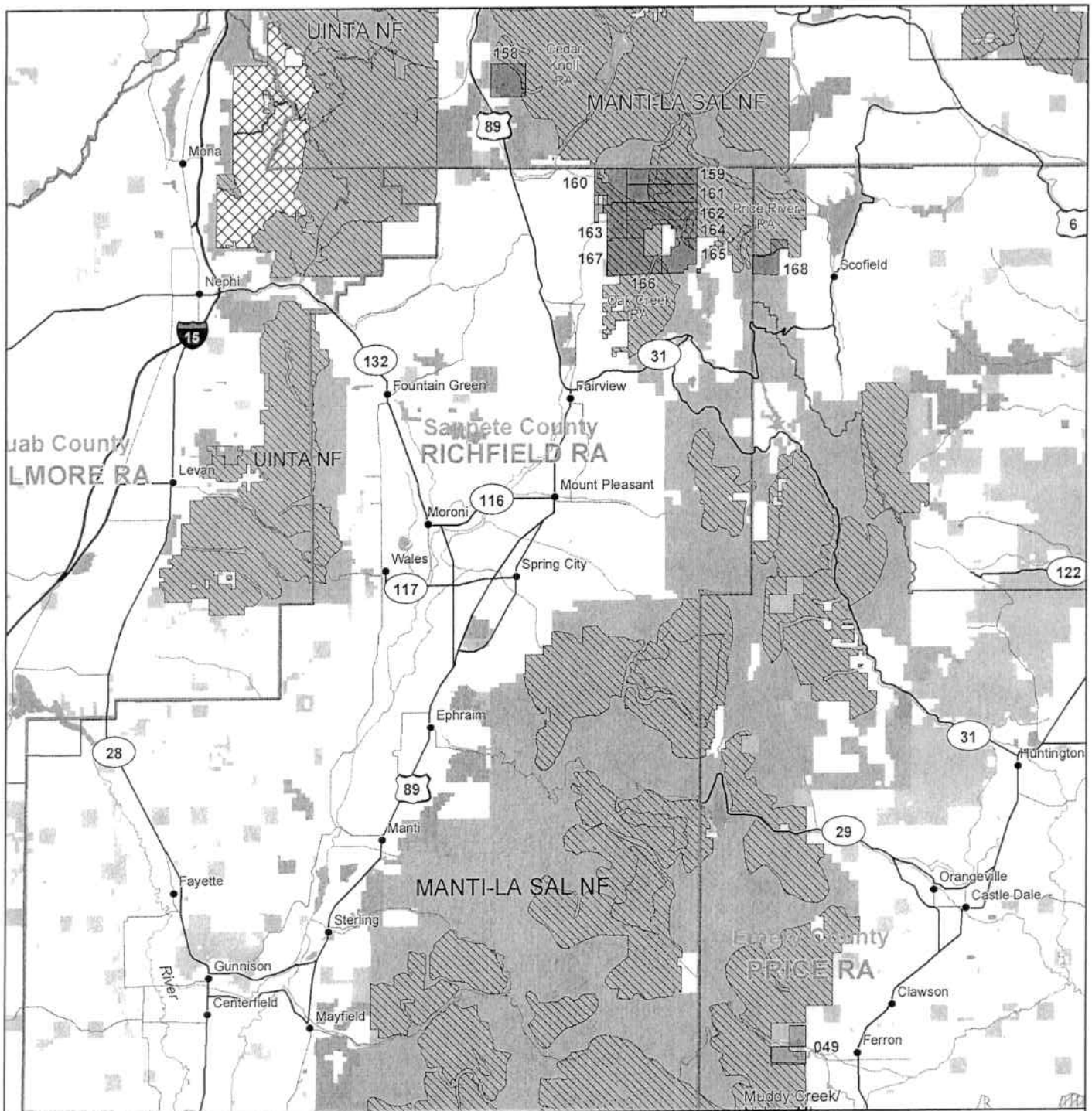
NEPA requires that the agencies take a hard look at the environmental impacts prior to offering these Manti-La Sal National Forest lands for leasing and to make the analysis available for public review and comment. The Forest Plan also requires site-specific analysis prior to leasing. In addition, the agencies must consult with FWS on the proposed parcels within the Manti-La Sal National Forest. Also, NHPA requires identification of cultural resources and consultation with Tribes and other Native American groups prior to leasing. The agencies have failed to comply with these mandates.

Therefore, Red Rock Forests respectfully requests that the agencies withdraw the protested parcels from leasing absent adequate protections for the substantial resource value of the proposed parcels, including roadless characteristics, ESA listed species, and cultural resources. In the event leases are issued for the protested parcels, Red Rock Forests also requests that the agencies provide notice of any APDs or other exploration and development activities proposed for these lands.

Respectfully submitted the 31st day of October, 2005.



SEAN PHELAN
Staff Attorney
Western Resource Advocates
Attorney for Red Rock Forests



Sanpete Valley Area Lease Parcels

Federal Lease Sale - Utah BLM, November 15, 2005

Lease Parcels

Land Management & Administration

| | |
|-------|-------------------------|
| BLM | USFS |
| BIA | State Parks & Rec Areas |
| DOD | State |
| NPS | Private |
| USFWS | |

Wilderness (BLM & USFS)

BLM Wilderness Study Area

Citizens' Wilderness Proposal

Area w/ Wilderness Character[^]

USFS Roadless Area

[^] 1998 BLM Wilderness Characteristics Inventory



0 5 10 15
Miles

NAD 1983 UTM Zone 12N
Data Sources: BLM, NRDC, SITLA, USDA-FS, UT-AGRC, WUP
Sara Watterson, Earthjustice | September 23, 2005